FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 24 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 594

RIORDAN J. A. ROETT, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERIC M. P. PEARSE,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdiction	2
Question presented	2
Statement of the case	3
Statutes involved	9
Reasons for allowance of writ	9
Brief in support of petition	11
Opinion of the court below	11
Statement of the case (see petition)	11
Argument	12
Conclusion	16

Table of Cases Cited

Casey v. *United States*, 276 U. S. 413	9, 14
Butts v. *United States*, 273 Fed. 38	9, 13
Gambino v. *United States*, 274 U. S. 310	9
Morei v. *United States*, 127 F. (2d) 827	9, 14
Sorrells v. *United States*, 287 U. S. 434	9, 13
United States v. *Echols*, 353 Fed. 862	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 594

RIORDAN J. A. ROETT, JR.,
Petitioner, Appellant Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

I

Summary Statement of the Matter Involved

1. The petitioner, Riordan J. A. Roett, Jr., was indicted in the United States District Court for the District of New Jersey charged with conspiring with others to violate cer-

tain provisions of the Internal Revenue laws of the United State to carry on the business of distillers on a certain farm in New Jersey, to possess the distilling apparatus and, among other things to sell distilled spirits without the payment of a tax. He was also indicted with others, and charged with committing the substantive offenses referred to in the conspiracy indictment.

2. The cases were tried together in the District Court of the United States for the District of New Jersey between September 21st and September 23rd, 1948. A directed verdict of acquittal was granted as to one of the other defendants, named in the indictments, and the other defendants, except petitioner, during the trial, retracted pleas of not guilty and entered pleas of guilty. The result was that the trial continued only as to petitioner.

Counsel for petitioner moved for a judgment of acquittal on both indictments, which motion was denied, and the cases went to the jury. Petitioner was convicted and subsequently the Court sentenced him to two years on the conspiracy charge and to a year and a day on the substantive charges, the same to run consecutively, making a total of three years and one day, from which judgment he appealed to the United States Court of Appeals for the Third Circuit, which Court affirmed the judgment of the Court below.

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule 37(b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

III

Question Presented

The question presented is whether or not petitioner was entrapped by Federal officers to violate statutes of the United States, and upon proof that he was so entrapped whether or not the trial judge should not have directed a judgment of acquittal instead of leaving it to the jury to determine the matter where there were no disputed questions of fact.

IV

Statement of Case

The petitioner in this case is a member of the bar of New Jersey. Some time prior to January, 1946, he met a man by the name of Copeland Kell who had a farm in Allenwood, New Jersey, and not far from Point Pleasant, New Jersey, the latter being a town on the Atlantic Coast ten or fifteen miles below Asbury Park. Kell was the first witness called by the government in the trial of the two indictments hereinbefore referred to and he testified that he had known the petitioner for two years prior to January, 1946 and that petitioner, when he first met him on his farm, was there "in search of just such a place," where a still for the illicit manufacture of alcohol could be erected. When they met again in January, 1946, the petitioner said to him "Hello, how have you been?" The witness went on to say that he could only give the gist of the conversation which was that petitioner wanted to rent either the house itself or some part of Kell's farm, and when the court asked the witness what his reply was Kell said "I told him I did not know whether I could or would do that and at that conversation I believe he said 'Try to find me some place.' The

conversation was general in that the word 'still' was not used. However my suspicions were aroused." Apparently this conversation took place about 18 months or 2 years after Kell had first met petitioner because following the above testimony he said that petitioner "had come to me possibly two years before that in search of just such a place. At that time I had just bought the farm and not yet lived there."

After the conversation at the farm first above referred to there was a second conversation with Kell in Point Pleasant, the purpose of which was whether or not Kell had found a place or would be willing to lease part of his farm. Kell assumed that it was for the purpose of building a still (26a, 27a). On that occasion Kell told the petitioner *that he would not do it.*

Kell also testified that he saw petitioner many times during the early part of 1946 and that as a result of the various conversations that he had with petitioner he got in touch with an agent of the Alcohol Tax Unit (27a). He was then asked the following question by the prosecutor:

> "And after that what happened?"

and he answered:

> "They told me to go ahead and rent him part of the farm."

He was then asked:

> "Did you rent him the farm?"

and he answered:

> "Subsequently I did."

Apparently petitioner prepared a written lease which was marked in evidence as Exhibit G-1, but this lease was not executed, as the witness testified until "approximately

several months later after the still was in operation" (27a). According to the testimony of Kell, he and petitioner made the verbal arrangements for renting the farm at $300.00 a month and completed these arrangements some time in March, 1948, and these arrangements were made in the presence of others (28a). It then appears from the testimony of Kell that the still was erected (30a).

On cross examination it was brought out that Kell first went to a Mr. Casey of the Alcohol Tax Unit, Mr. Casey being the local agent of that unit and located at Asbury Park, and that he said to Casey:

> "I told him I had been approached by a man who was suspicious with a proposition, a proposition of which I had some suspicion" (42a).

Kell also testified that subsequently he talked to a Mr. Gettel who was apparently a superior of Casey with headquarters in Newark, New Jersey. Gettel came to see him and Gettel said:

> "It would be perfectly all right for me to let them start operations, to lease part of the farm" (42a, 43a).

He was then asked the question:

> "Did Mr. Gettel say to you 'Go ahead and let these people come on to your farm, work with the Government and you will be all right?' "

and after some argument he answered:

> "Words to that effect, yes, sir" (43a and 44a).

Kell further testified that the Alcohol Tax Unit planted an agent by the name of Nilsen on the farm in the disguise of a farm laborer and that Nilsen remained there during the whole operation and assisted in it. Kell was then asked the following question:

> "You wrote the letter to Mr. Johnson (Kell knew petitioner by that name) and in response to that letter you had a visit and as a result of that letter you had a tenant for the place and as a result of that tenant certain activities took place, and you received three hundred dollars, part of which you turned over to the ATU, part you kept, and eventually you received the whole thing, so you have three hundred dollars now, isn't that right?"

and Kell answered:

> "That is right."

He also testified that the lease which petitioner prepared, he turned over to the ATU (50a).

The government also called as a witness at the trial of the case a man by the name of Legg, who turned out to be the Chief of Police of Brielle, another town on the Atlantic coast and not far from the Kell farm. It seems that Legg had known petitioner since 1941 (58a).

Between January and April of 1946 Legg was attending an FBI school in Washington, D. C. for Police Chiefs and that in the latter part of January 1946 petitioner called him on the telephone while he was in Washington and stated that "everything was all set to go ahead" (58a, 59a). Legg then testified that after he had the telephone conversation with petitioner he sent a note to Homer Casey, the agent of the ATU hereinbefore referred to, telling him of the telephone call and the nature of the conversation. Legg did not return home until the first of April (60a).

The government also called Gettel, the agent in charge, above referred to, and defense counsel made him his own witness, and in response to a question as to whether or not he had consulted with Copeland Kell, he said:

> "Mr. Kell, at that time told me of the happenings up to and including that present time of contacts and

relations he had had with various defendants; in this case and requests made by them to rent his farm near Allenwood, New Jersey. He had asked me prior to that time if the Government was interested in having or working the case if an illicit distillery was erected on his premises. I had informed him and assured him that we were and had told him before that if such was to be, that he was to rent his farm for that purpose and keep the Government fully informed of all happenings, that there was no objection as far as the Government was concerned.

"In January he had told me that they were wanting to rent his farm again, anew, from the prior contracts, and I at that time again told Mr. Kell not in any way, shape or form to entice them or encourage them in setting up the distillery, that all of the original information and going forth of such a project should come from them."

It then appears that Kell did not come to see Gettel, but that Gettel went to see Kell at the farm with Investigator Casey, hereinbefore referred to, and on further questioning he testified as follows:

"Q. What did Mr. Kell say to you in January 1946 at the Kell farm? A. That he had a further request to rent his farm, and he asked me again, as I related here, whether or not it was all right to go ahead, and I assured him it was.

"Q. You did permit him to go ahead? A. Not he but in renting his farm, yes, and that I instructed him at that time not to entice or to encourage anyone that he was dealing with to engage in any illegal operation, that all of those things should come from them. In other words, they were carrying on the project.

"Q. Did you send Secret Investigator Nilsen to the Kell farm in 1946? A. I did, sir, and I made arrangements at that time or talked it over with Mr. Kell about placing—it was suggested that we place an investigator

there on the farm, and it was terminated (sic.) in that on February 15 and 16——

"Q. You sent Nilsen in? A. Caused him to go there, instructed him to go there, yes, sir.

"Q. Did you send him in in the guise of a farmhand? A. I sent him down there to be what we term as a 'dumb farmhand,' and he was likewise instructed very specifically by myself in my office at Newark, New Jersey, not to entice or help them in any way other than if they asked for help, to be there on the premises, to keep silent, to keep in the background with the idea that they would hire him to work for them.

"Q. Did you permit Mr. Nilsen to participate in any distilling activities? A. He did participate in the distilling activity."

It appears that Nilsen arrived at the Kell farm on the 17th of February, 1946 and remained there until June 1946.

The attention of the Court is also called to the testimony of Mr. Greenhalgh of Lakewood. This testimony appears at page 71a. He is a well driller. He testified that in the middle of March, 1946 Copeland Kell called him to see about drilling a well on his farm and that he put off the appointment for at least two weeks because he was going to Florida. Greenhalgh testified that on his return from Florida two or three weeks later he went to the Kell farm and saw Mr. Kell.

Greenhalgh's partner, Rudolph Kay, then testified that he was in charge of the actual drilling operations and that it was in March, 1946.

As the argument in this case will be based entirely on the question of entrapment it is deemed unnecessary to relate in detail the events which subsequently took place, which included the erection of a distillery and the manufacture of intoxicating liquor and the subsequent seizure and arrest not only of petitioner but the other defendants named in the indictments.

V

Statutes Involved

As the construction of statutes of the United States are not involved in this application for a writ of certiorari we deem it unnecessary to set forth the statutes upon which the indictments are based.

VI

Reasons for Allowance of Writ

The decision of the United States Court of Appeals for the Third Circuit conflicts with the decisions of this Court and other Circuit Courts of Appeal in the cases of *Sorrells* v. *United States,* 287 U. S. 434, *Butts* v. *United States,* 273 Fed. pg. 38, *Morei* v. *United States,* 127 Fed. (2d) 827, *United States* v. *Echols,* 353 Fed. pg. 862, *Casey* v. *United States,* 276 U. S. 413, *Gambino* v. *United States,* 274 U. S. 310, and many others, in that when it was shown by proof before the trial court that the defendant in a criminal case was entrapped or enticed by a Federal officer to violate statutes of the United States it is the duty of the trial judge to end the prosecution of the case by granting a judgment of acquittal and not to leave it to the jury to determine uncontradicted questions of fact.

Respectfully submitted,

Riordan J. A. Roett, Jr.,
By Frederic M. P. Pearse,
Attorney for and of Counsel with Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 594

RIORDAN J. A. ROETT, JR.,
Petitioner, Appellant Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Third Circuit appears in the record submitted herewith.

II

Statement of the Case

A full statement of the case is included in the preceding petition under Point IV.

III

ARGUMENT

The Trial Court erred in refusing to grant a judgment of acquittal at the conclusion of the trial and the United States Court of Appeals for the Third Circuit erred in upholding the ruling, it appearing from uncontradicted proof that petitioner was entrapped and incited to commit offenses against the United States.

The only point which we are raising is on the question of entrapment and we urge that on the facts presented at the trial when the motion was made to direct a judgment of acquittal on the ground that petitioner had been entrapped by government agents, the motion should have been granted, and that the Court of Appeals erred in upholding the trial court.

Considering the testimony in this case in its worst light, so far as petitioner is concerned, the picture presented by the undisputed testimony is that, in effect, Roett, the petitioner herein, said to the farmer Kell that he had the mind to violate certain Internal Revenue statutes of the United States by erecting and operating an illicit still and manufacturing intoxicating liquor therein without paying the necessary taxes on such product so manufactured, and that the farmer, Kell, told him that he would not aid him in his desires by furnishing him with a place where the still might be erected and the illicit liquor manufactured. Farmer Kell did not keep to his expressed intentions, but shortly after the conversation with petitioner Kell got in touch with a representative of the Alcohol Tax Unit with the result that he was told by a Mr. Gettel, the head of the Alcohol Tax Unit investigators, who came down to see him at his farm, to go ahead, inform Roett (the petitioner) that he

was ready to lease his farm for the purpose of erecting a still thereon and in this way inducing Roett to take the necessary steps to violate the statutes and commit offenses against the United States, *i. e.*, to conspire to commit such offenses with others or to actually commit the substantive offenses. Kell even hired the well driller (71a *et seq.*), to supply water for the still.

If Kell, at the instigation of the Federal officers had not written the letter to Roett inducing him to go ahead with his desire to violate Federal statutes, nothing more would have happened and the ultimate crimes would not have been committed.

The prevailing opinion on the subject of entrapment seems to be that expressed by Justice Roberts in the *Sorrels* case (*Sorrells* v. *United States*, 287 U. S. 434 at pg. 458, 77 L. Ed. 413 at pg. 426) that "courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy."

There is an illuminating opinion by Judge Sanford in *Butts* v. *United States*, 273 Fed. p. 38. This opinion is cited by Chief Justice Hughes in his opinion delivered in the *Sorrells* case, *supra*. In the *Butts* case at page 38 Judge Sanford said:

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

In the *Sorrels* case, *supra*, Chief Justice Hughes, at page 448, said:

> "We think that this established principle of construction is applicable here. We are unable to con-

> clude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar the prosecution."

See *Morei* v. *United States,* 127 Fed. (2d) 827 and 835; *Casey* v. *United States,* 276 U. S. 413 at 423, 72 L. Ed. 632 at 636, in a dissenting opinion by Justice Brandeis.

There are many cases on the subject, but those which we have pointed out including the citations of other authorities in the above opinions are clearly definitive of what this Court means by a Federal officer entrapping a person to violate statutes of the United States. Despite the use of expressions in these opinions, of government officials inducing *otherwise innocent persons* to violate the statutes of the United States, we feel that these expressions are only made because of the particular facts in the particular cases before the courts. The mere fact that a person had the intention or the desire to violate a statute of the United States does not justify a federal officer in inducing him to violate the statute and no authority supports this view. It seems to us, that these decisions on the subject of entrapment clearly hold that federal officers are only justified in setting a trap where they have been unable to secure sufficient legal evidence against known offenders of the statutes and need additional proof to support a lawful prosecution.

The United States Court of Appeals for the Third Circuit upheld the trial court in refusing to direct a judgment of

acquittal. In reaching its conclusion the Court had this to say:

> "There was no instigation on the part of the federal officers, Legg, or Kell which induced Roett to engage in the illegal acts for which he was indicted, nor was he persuaded or enticed into a course of criminal conduct by their actions. Roett over a period of years persistently followed a criminal design which originated with him and his associates. While it is true that Kell and Nilsen were employed as decoys, nonetheless the employment of decoys by law enforcement officers finds full sanction in the authorities."

Here we feel that the United States Court of Appeals fell into an error in the interpretation of the decisions of this Court. Following a "criminal design" to violate statutes of the United States does not justify officers of the United States to induce persons to commit crimes against the United States unless there is some reason to believe *that they have already done so.* Crime should not be encouraged by officers of the law. Their duty is to deter and not to incite. When otherwise "innocent persons" are referred to in the opinion of Chief Justice Hughes in the *Sorrels* case, *supra,* the Chief Justice must have referred to persons who had not, before the trap was laid, committed violations of the statutes of the United States or to persons against whom there was proof or suspicion on the part of officers of the law that they had already done so. In the instant case there was no suspicion even that petitioner had ever violated the statutes referred to in the indictment and from the undisputed facts in the case he was clearly induced to do so by officers of the United States.

We urge that the questions that we have raised are of sufficient importance for this Court to review the decision of the Court of Appeals and if necessary to further clarify the law on this important subject of entrapment not only

for the protection of the citizen charged with offenses against the United States but also for the guidance of Federal law enforcing officers in the performance of their duties.

Conclusion

Your petitioner respectfully submits that the Court of Appeals for the Third Circuit has failed to follow the applicable decisions of this Court, and that a conflict exists between its decision and the decisions of other Circuit Courts of Appeal and of this Honorable Court, and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner.

(1097)